



# pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF WATER MANAGEMENT

October 8, 2014

Mr. Jon Capacasa, Director  
Water Protection Division  
U.S. EPA Region III  
Mail Code: 3WP00  
1650 Arch Street  
Philadelphia, PA 19103-2029

Dear Mr. Capacasa:

Jon

To further foster a mutual understanding and improved working relationship between our two agencies relative to Pennsylvania's Nutrient Trading Program, and as a follow-up to my previous letter concerning the Environmental Protection Agency's (EPA) objections to the Nutrient Trading provisions in a number of the Department of Environmental Protection's (DEP) draft National Pollutant Discharge Elimination System (NPDES) permits, I am writing to bring to your attention a number of unresolved issues we have with the Technical Memoranda EPA is in the process of finalizing, or has already finalized, relative to the implementation of a Nutrient Trading Program in the Chesapeake Bay Watershed.

DEP staff has diligently reviewed and commented on every technical memorandum, as the opportunity presented, and has repeatedly offered to meet or discuss our comments with your program staff. Some of our suggested edits have been accepted; but for the most part, our comments and offers to discuss issues we have identified have been ignored, and the technical memoranda have been finalized with little or no substantive revisions or report out as to the disposition of the comments, including those of other jurisdictions. A summary of the comments and issues that we believe still remain unresolved is as follows:

1. In several of the technical memoranda, EPA proposes to require, among other things, detailed contracts for the buying and selling of credits and details on the calculation and verification of credits to be used by the system to be included within the permit, fact sheet and administrative record of the permit. This precise information should be part of the process of nutrient trading, and not within each and every permit, as situations can change from year to year. The permit language should only include authorization language. Including this level of specificity in the permit will be impossible to implement.
2. In the last few Technical Memoranda, EPA began to insert language indicating an intention to review "all permits for significant dischargers in the Chesapeake Bay and for any new or increased dischargers, as well as any permit involving an offset or trade." In our comments, we asked for clarification as to what this review may encompass, and the scope of permits EPA is considering including in this review. For example, does EPA intend to start reviewing every NPDES permit application for stormwater control from construction activities? DEP continues to express its concern over the impact to NPDES permitting and nutrient trading, the delay this may cause in the release of these permits and the workload this will cause, not only the states but EPA. DEP has also clearly expressed its view that the use of these Technical Memoranda is not the mechanism EPA should be using to notify the states of this intention. This is more of an issue to be addressed as part of NPDES permitting and Memorandum of Agreement EPA has with each state for the implementation of that

activity. DEP has expressed the concern that tying these kinds of reviews to nutrient trading could, in effect, kill the program.

3. The application of a 2:1 uncertainty ratio to transactions involving nonpoint source credits should not be automatic; instead it should be based on a set of defined, scientific criteria. DEP offered alternatives to an across-the-board application of a 2:1 ratio. None of these alternatives were considered, nor were they discussed with us. DEP also co-signed a letter with Maryland and West Virginia, concerning this issue.
4. In the Local Water Quality Technical Memorandum we proposed language to allow for the use of credits generated below a local Total Maximum Daily Load (TMDL) to also be used outside the local watershed to meet the Bay TMDL, and vice versa: where credits generated below the Bay TMDL could be used to offset a lower local TMDL in a watershed located downstream of the site where the credits were generated. This would have given us some flexibility to offset new loads and implement the program.
5. DEP acknowledges that as part of the negotiations with EPA to resolve the objections to our permits, we have agreed to change our sampling protocols to be consistent with the Technical Memorandum on Representative Sampling; however, I do want to point out that we did express a number of technical issues with this Technical Memorandum. Most notably, if the purpose of the sampling results is to determine whether or not the frequency of sampling needs to be changed to ensure results accurately represent the pollutant loading being discharged, then this is an issue of overall compliance with permit limits. This is not an issue for the nutrient trading alone. Further, this Technical Memorandum establishes some significant sampling requirements on systems wanting to trade based on an analysis of the sampling results for just two systems in the Bay watershed. DEP asked that the data from more systems be analyzed and that the results from a rather significant storm during the sampling period be more effectively factored into the conclusions. DEP also asked to see the data. In addition, we made some editorial suggestions and corrections like the needed correction to the definition of NPDES. None of these requests, comments or suggestions were accepted or acknowledged, even the simple correction needed to the definition of NPDES. In fact, no response was provided at all.
6. When the Technical Memorandum on Credit Calculation was released we raised questions as to the process described, the terminology used and some proposed changes we were making at the time to our own processes. A second Technical Memorandum on Certification and Verification was just shared with us a few weeks ago. Based on this draft document, we think our current process is consistent with what EPA is describing; but we are unsure. Our questions about changes to the current process, should we decide to pursue them, also remain.
7. The Technical Memorandum on Credit Calculation also proposes to only allow credits to be generated using Chesapeake Bay Partnership approved practices. While we agree that eventually all practices should be approved by the Chesapeake Bay Partnership, especially if the practices are going to be heavily relied upon by the state to achieve the required load reductions, we must point out that this process can take over two years to complete. The states need the ability to move forward with innovative technologies to allow for credit generation while this approval process is conducted. As long as the states have a process in place to review the science behind these technologies, the states should be allowed to approve these technologies for credit generation.

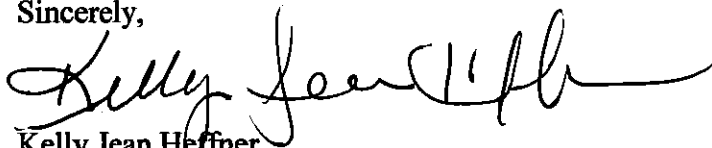
8. In the Technical Memorandum on Credit Permanence, we raised issues about the assumptions made concerning the loadings from non-significant point sources and errors we found that have resulted in an excess of nutrient loading from point sources. As a result, Pennsylvania has more load than anticipated to work with. Pennsylvania's assumption based on EPA's adaptive management philosophy for TMDL implementation is that we may assign loads where necessary that may not necessarily be zero, as long as the overall wasteload allocation will not be exceeded.
9. The Technical Memorandum on Credit Permanence creates a liability on the part of the NPDES permittee above and beyond what is reasonable by not allowing the state to account for extenuating circumstances, such as extreme weather, when determining compliance obligations when a seller defaults. Not allowing for these types of situations may be in direct conflict of our existing regulations and is impracticable to implement.

EPA emphasizes these Technical Memoranda are guidelines, yet the memoranda repeatedly state that EPA will review every permit and will not allow issuance of a permit if it is not compliant with the conditions of the Technical Memoranda. As a result of that approach, these memoranda are not guidelines, they are requirements. They establish a significant binding norm for every permittee in the Chesapeake Bay watershed; therefore, at minimum they must be regulations.

Pennsylvania was the first state in the watershed to have a fully functioning, very successful Nutrient Trading Program. We are finding it very frustrating that the experience that we have in the implementation of this program is being either discounted or completely ignored. I find it contrary to the collaboration and co-regulator partnership we often discuss, and that Administrator McCarthy specifically addressed in her Keynote remarks at the recent ECOS Meeting in Santa Fe. If EPA is serious about encouraging a viable Nutrient Trading Program in the Chesapeake Bay watershed, we believe that EPA needs to offer more consideration to our experience and expertise in nutrient trading, and the observations we have provided regarding the implementation of the program and the impact the Technical Memoranda will have on program operation.

I look forward to continue working with you to address these issues.

Sincerely,



Kelly Jean Heffner  
Deputy Secretary

Enclosures